**International Longshoremen's and Warehousemen's Union; and Ship Scalers and Painters Union, ILWU, Local 56 *and* A.M. Pumping, Inc.** Case 21–CD–589

July 31, 1989

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

The charge in this Section 10(k) proceeding was filed on February 11, 1991, and the amended charge was filed on March 7, 1991, by the Employer, alleging that the Respondents, International Longshoremen's and Warehousemen's Union (the International); and Ship Scalers and Painters Union, ILWU, Local 56 (Local 56)[1] violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees they represent rather than to the Employer's unrepresented employees. The hearing was held on May 14, 1991, before Hearing Officer Kevin R. Steen.

The National Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

## I. JURISDICTION

A.M. Pumping, Inc., a California corporation engaged in the business of hazardous waste management, is based at 999 East G Street, Wilmington, California. During the 12-month period preceding the hearing, it has sold and shipped goods valued in excess of $50,000 directly to customers located outside the State of California. The record reveals, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the International and its Local 56 are labor organizations within the meaning of Section 2(5) of the Act.[2]

## II. THE DISPUTE

### A. *Background and Facts of Dispute*

The Employer has been in the business of hazardous waste management for several years and has never had a collective-bargaining agreement with the Union nor with any other union. In late January or early February 1991, the Employer was hired by Panobulk, a shipping company, to clean up an oil spill in the Los Angeles harbor. The Employer's steady work force includes 35 to 40 employees who regularly do cleanup operations. These employees have each received a minimum of 40 hours training and, in addition, are given annual refresher courses arranged and provided by the Employer. Occasionally, additional workers are recruited for a specific job. In this instance, after commencing the cleanup, the Employer determined that additional workers were required because of the size of the oil spill. The Employer augmented its own work force to a total of about 200 by hiring additional laborers whose training certification was current. Most of those hired were individuals whom the Employer had recently employed at another oil spill and who had received 8 hours of site-specific training at that time.

Brian Charles Roth, the Employer's administrator, testified that, initially, Joe Ibarra, an International representative, and Constantino Castro, president of Local 56, asked the Employer to sign a contract and tendered a copy of a contract they had with another company. Roth testified that he told them that the proposed contract was unacceptable to the Employer. Roth also testified that on numerous occasions Castro threatened to get the Employer off the job and to shut it down. Roth further testified that in his presence Castro told Ruben Garcia, the Employer's general manager, that Castro wanted Garcia to sign a contract and use Castro's people instead of the Employer's own people, or Castro would do what it took to get the Employer off the job. A few days after this threat was made, Local 56 began picketing with 40 to 50 individuals carrying signs stating the Employer paid ''sub-wages.'' The picketing caused a construction job in the same area to shut down and resulted in the Employer's being removed from the jobsite.

The Employer then moved to a different location across the harbor and worked on the spill from another facility without incident. However, when the Employer moved up the channel to a third dock, Castro again made threats, picketing ensued, and the Employer was asked to leave that facility.

### B. *Work in Dispute*

The disputed work involves steam cleaning rocks and pilings, laying containment booms, utilization of absorbent pads to soak up oil, and all other related tasks involved in cleaning hazardous waste and oil spills which Panobulk hired A.M. Pumping, Inc., to perform at the jobsite in and around the Los Angeles harbor.[3]

[1] The International and Local 56 are hereafter collectively referred to as the Union.

[2] The Union was not present at the hearing, and its counsel had advised the hearing officer prior to the hearing that the Union would not attend.

[3] The notice of hearing described the disputed work as steam cleaning rocks and pilings, laying containment booms, utilization of absorbent pads to soak up oil, and all related other tasks involved in cleaning hazardous waste and oil spills at jobsites within the jurisdiction of the Unions, at which A.M. Pumping, Inc. performs said work. However, we find that the record does not support such a broad description of the work in dispute.

C. *Contentions of the Parties*

The Employer contends that the Union violated Section 8(b)(4)(i) and (ii)(D) of the Act. The Employer further contends that the work in dispute should be awarded to its unrepresented employees on the basis of company assignment and preference, past practice, industry practice, skills and training, and economy and efficiency of operations.

The International and its Local 56 did not participate in this hearing and did not present evidence concerning their positions.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a union has threatened to use or has used proscribed means to force an employer to assign work to one group of employees rather than to another.

Although there was testimony that International Representative Joe Ibarra made a demand of the Employer for a contract, there is no evidence that any International representative engaged in coercive conduct or other activity proscribed by the Act. Accordingly, reasonable cause does not exist to believe that the International has violated Section 8(b)(4)(D).

With respect to Local 56, as noted above, Brian Charles Roth, the Employer's administrator, testified that Constantino Castro, president of Local 56, told Ruben Garcia, the Employer's general manager, that ''he wanted him to sign a contract, and that he wanted him to use his people and get rid of our people, immediately, or he would . . . do what it takes to get him off the job.'' Shortly thereafter, Local 56 picketed the site where the Employer was working.

We find that Castro's statements to Garcia constituted a demand for work that the Employer's unrepresented employees were performing. Consequently, we conclude that there are active competing claims to disputed work between rival groups of employees.[4]

In light of Roth's testimony, we also find reasonable cause to believe that Local 56 violated Section 8(b)(4)(D). The record reveals no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certification and collective-bargaining agreement

There is no evidence that the Union was ever certified by the Board to represent the employees of the Employer. The Employer is not now, and never has been, party to a collective-bargaining agreement. This factor does not favor awarding the work in dispute to either group of employees.

2. Company preference and past practice

The Employer has always used its own employees and prefers to continue to do so. This factor favors awarding the work in dispute to the Employer's own employees.

3. Area and industry practice

The Employer presented evidence that fewer than half of the companies in this industry used employees represented by any labor organization. The record indicates that two other companies working at the oil spill with the Employer have collective-bargaining agreements with the Union, but the record does not show the total number of companies that operate in the area. We find that the evidence is inconclusive and that this factor does not favor awarding the work in dispute to either group of employees.

4. Relative skills

The evidence shows that the Employer's own employees have each received a minimum of 40 hours' training, have been trained to work with hazardous materials and to operate specialized equipment, and possess the requisite skills and training to perform the work in dispute. There is no evidence concerning the skills and training of the employees represented by the Union. This factor favors awarding the work in dispute to the Employer's own employees.

5. Economy and efficiency of operations

Roth testified that hazardous waste management is a highly regulated industry, controlled by both Federal and state regulations, and that the Employer must keep records of its employees' training history available for inspection by governmental bodies. Roth further testified that the Employer is extremely concerned about safety both in the handling of hazardous waste and in the operation of machinery used in its operations and

[4] See *Longshoremen ILA (Coldwater Seafood)*, 237 NLRB 538 (1978).

is better able to assure that its workers are properly trained by using its own employees for whom it provides extensive training and annual refreshers. The Employer requires workers who do not need additional training because it must be able to respond immediately to hazardous spills. This factor favors awarding the work in dispute to the Employer's own employees.

## Conclusions

After considering all the relevant factors, we conclude that the unrepresented employees employed by A.M. Pumping, Inc. are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and past practice, economy and efficiency of operations, and relative skills and training.

The determination is limited to the controversy that gave rise to this proceeding.

## DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Unrepresented employees employed by A.M. Pumping, Inc. are entitled to perform the work in dispute which consists of steam cleaning rocks and pilings, laying containment booms, utilization of absorbent pads to soak up oil, and all related other tasks involved in cleaning hazardous waste and oil spills which Panobulk hired A.M. Pumping, Inc. to perform at the jobsite in and around the Los Angeles harbor.

2. Ship Scalers and Painters Union, ILWU, Local 56 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force A.M. Pumping, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Ship Scalers and Painters Union, ILWU, Local 56 shall notify the Regional Director for Region 21 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.